92-1562

Supreme Court, U.S.
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NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RODNEY BROWNING PETITIONER

VS.

UNITED STATES OF AMERICA RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DEANNA L. DENNISON
Counsel for Petitioner
524 Greenup Street
Covington, Kentucky 41011
(606) 491-3700

QUESTION PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT BY FAILING TO GRANT THE PETITIONER'S MOTION TO SUBSTITUTE COUNSEL.

PARTIES TO THIS PROCEEDING

The parties to this proceeding are those contained in the caption of the case in this Court, namely:

RODNEY BROWNING. . . . . .PETITIONER

UNITED STATES OF AMERICA . . . RESPONDENT

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The opinion delivered in the Court below, that is, the United States Court of Appeals for the Ninth Circuit, affirmed the Petitioner's conviction on December 16, 1992 by Judgment and Order Number 91-50317 which was not recommended for publication. A copy of the Memorandum of the Court of Appeals for the Ninth Circuit consisting of five pages is appended hereto.

JURISDICTIONAL GROUNDS

(i). The Opinion of the Ninth Circuit Court of Appeals was rendered on December 16, 1992.

(ii). No request was made for rehearing and no extension was requested for additional time to file this Petition.

(iii). The Supreme Court has jurisdiction to grant Certiorari in this case and the statutory provision believed to confer jurisdiction on this Court to

review the judgment in question by Writ of Certiorari is 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following Constitutional Provisions are involved:

> The Sixth Amendment to the United States Constitution states as follows:
>
> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE AND BASIS FOR FEDERAL JURISDICTION

The Court of Appeals for the Ninth Circuit has jurisdiction over appeals from final judgment under 28 U.S.C. Section 1254(1) and from final sentence under 18 U.S.C. Section 3742(a)(2).

On July 18, 1987 the United States of America, in a multi-defendant, multi-count indictment, as superseded by a fourth superseding indictment filed on December 3, 1987, as redacted by the United States of America before trial, charged the Defendant, **RODNEY BROWNING**, with one count of conspiracy in violation of 21 U.S.C. Section 846, and two counts of distribution of a Schedule II controlled substance in violation of 21 U.S.C. Section 841(a)(1) (counts 15 and 23 of the fourth superseding indictment).

The Defendant was not arraigned until September 12, 1989, at which time he pled not guilty to all the charges against him

and a public defender was appointed to represent him. An initial trial date was set for November 7, 1989; however, by stipulation of the parties, without consulting the Defendant, the trial date was vacated and an order was entered by the court that a new trial date be set at such time as the Ninth Circuit Court of Appeals entered an opinion regarding the district court's ruling denying certain co-defendants' motions to suppress wiretap evidence which was used at their trials. The Defendant was not present at the motion to suppress nor was the Defendant's public defender and therefore, no one was present on behalf of the Defendant to cross examine the Government's witnesses on the Defendant's behalf.

After the Ninth Circuit Court of Appeals entered its opinion in the appeals which affirmed the denial by the district court of their motions to suppress the

wiretap evidence at their trials, the court reset the Defendant's trial for November 27, 1990.

On October 4, 1990, approximately eight weeks before trial, a status conference was held, with the Defendant and his public defender being present. The court had received a letter from the Defendant in which he vehemently expressed his dissatisfaction with defense counsel on the following grounds: that his public defender did not have the time to prepare a defense because he was very involved in another case which hadn't allowed him to work on the Defendant's case, that his public defender hadn't visited him regarding his case, hadn't returned his phone calls, hadn't presented any motions in his case, and hadn't even advised him whether he would even be going to trial.

In response, the Defendant's public defender admitted that he hadn't returned

the Defendant's phone calls and had delegated the visitation time to his "court-appointed investigator" who has "run the ball substantially on that particular issue." He acknowledged that there had been "time constraints" (for over a year?) and that "I delegated to the extent that I did and felt the delegation was as to tasks which I felt were appropriate to delegate." The Defendant's public defender acknowledged to the court that he was very involved in another case and agreed that the Defendant was correct.

Upon further examination by the court, the Defendant's public defender revealed that a dispute existed between the Defendant and himself regarding a "stipulation" as to the authenticity of certain tapes to be used at trial. He claimed that if the Defendant did not stipulate that his "task would be just a bit harder" and that the Defendant should

not hold that against his performance. The court disagreed.

Court: It is the Petitioner's absolute right not to stipulate and that if it takes a little longer to present the case, then sobeit. His right is paramount. You may explain to him what the pros and cons are, but ultimately that has to be his choice.

The court then asked the Defendant to comment upon the letter he wrote concerning his representation.

Defendant: I had him for the last 12, 13 months and I just, I have been sitting over in the jail over there and I haven't seen nobody...I haven't seen him even at the jail over 10 times.

Court: Have you been seeing his people from his office, investigators?

Defendant: No...I have seen Kristine two times, two to three times in the last six months.

Court: Have you been presented with transcripts, digest and things like that?

Defendant: Back in April.

Court: But, those are the same transcripts that we will be dealing with in trial.

Defendant: Transcripts or digests. Since June she came one time.

Court: Have things been left with you to look at?

Defendant: Back in April. I haven't had nothing else since that.

The court recognized that the Defendant had been in custody for 12 or 13 months and made it known to the Defendant's public defender that he was concerned about his lack of contact with his client.

Court: Now, Mr. Nicolaysen, from now until November 27, is almost eight weeks, seven weeks, its plenty of time. You have to make more time to see Mr. Browning. You have to make more time to see Mr. Browning...But, from here on in you have got to at the end of the day march over there at 5:00 o'clock and speak to Mr. Browning and find a way to communicate with him.

After reviewing the Defendant's

complaints in open court and the response of the Defendant's public defender, the district court denied the Defendant's request for appointment of new counsel.

On November 13, 1990, seven days before trial, the Defendant, in a panic, sent another letter to the court expressing his desire to substitute counsel because of the public defender's continuing lack of communication with him and their relationship as attorney and client.

The Defendant's public defender responded by submitting to the lower court a declaration under seal which the Defendant and the United States had no right to see or respond to. The Court on its own reviewed the response of the Defendant's public defender and refused to openly address the Petitioner's fears and concerns about his representation.

Court: I invited his response and what I will do is

study his response and your letter. I don't have a chance right now. If necessary, I will hold another hearing or make some appropriate order as a result. In other words, I have your letter and I have his response.

Court: You filed your declaration under seal.

Nicolaysen: I don't want to serve the Government with it or have it be a part of public record.

Court: I will keep it under seal. This has to do with his response to Mr. Browning's motion regarding some of Mr. Browning's concerns about his representation.

Gordon: I don't see why that should be filed under seal. I assume the defendant is trying to get Mr. Nicolaysen excused or substituted out.

Court: Yes.

Gordon: There is no basis for the government not being able to see the argument.

Court: Shouldn't that be only if I find it to be meritorious? In other words, if I am able to rule on the papers without further inquiry,

shouldn't I protect the confidence?
In other words, if I read the papers and I find that based upon my reading of the papers that the motion is without merit, then I think I ought to keep the declaration under seal.
If I believe that it warrants further inquiry, then I think that I ought to consider unsealing it.
Shouldn't it wait an initial examination.

Gordon: Here is the only reason I think it may not. What if the government has some explanation for certain things that may, in fact, show the defendant's claim lacks merit? Your Honor may not know it. Defense counsel may not have known it. The government may say, No, your Honor, Rodney Browning's argument on this is insufficient because of X, Y, Z.

Gordon: Assume your Honor goes ahead and denies the motion. Rodney Browning would have an appeal down the line for improperly denying to substitute counsel when we may be able to circumvent that argument.

Court: Let's just wait a reading of the response. I haven't

done that yet.
I just received it.

The court issued an Order stating that the Defendant's letter to the court dated October 31, 1990 be considered a motion to relieve court appointed counsel, and that the court, having reviewed the defendant's motion and the declaration of counsel Gregory Nicolaysen, filed under seal, denied the Defendant's motion without a hearing and no further discussion was permitted.

The Government began to try its case on November 27, 1990. Upon closing their case, the Defendant's public defender simply stood up and declared that the defense rested without presenting any evidence or calling a single witness. As the district court began to instruct the jury, the Defendant, obviously in a fit of frustration and anger over his public defender's refusal to present any defense on his behalf, when he was facing life

without parole, literally attacked his attorney in front of the jury.

The jury was excused after having witnessed the altercation between the Defendant and his attorney, only to return twenty-five minutes later observing the Defendant hand-cuffed and sitting with the marshalls, while his attorney sat alone at defense table.

The court allowed defense counsel an hour and a half to compose himself and present his closing argument while in tattered clothes.

When proceedings resumed the afternoon of November 29, 1990, counsel announced that they had reached a plea bargain agreement whereby the Defendant would plead guilty to count 23 of the redacted indictment, in return for which the Government would drop the conspiracy charge (count 1 of the indictment) as well as count 15 of the redacted indictment.

The court refused to accept the plea bargain agreement on the basis that the trial had concluded and the government's case was strong (which is obvious when no defense was presented).

Consequently, the jury returned a verdict of guilty on all counts. The Defendant was ultimately sentenced to life on Count I and received thirty (30) years each on Counts 15 and 23.

ARGUMENT FOR GRANTING WRIT

THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR SO FAR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

The Defendant was clearly denied his right to counsel granted to him under the Sixth Amendment of the United States Constitution. The Defendant was an indigent black person who was facing a sentence of life in prison. Counsel had

been appointed to represent him due to his indigency and the Defendant clearly extremely concerned about his representation due to the fact that his attorney had not come to see him for over twelve to thirteen months and he sent a letter to the court requesting the court to substitute counsel. The court chastised his public defender and requested that the public defender do a better job of communicating with the Defendant. Defendant's counsel admitted not having enough time to handle this case because he was handling another case. Upon the court's direction regarding any other concerns that he may have the Defendant again wrote a letter to the court again prior to trial continuing to address the same concerns he had addressed approximately eight weeks ago regarding his representation. The court refused to openly address the issues that were

troubling the Defendant and permitted the public defender to respond to the Defendant's letter under seal. Both the United States and the Defendant were not permitted to witness the response of the Defendant. He made a decision, the substance of which could not be reviewed by anyone and denied the Defendant's ultimate Motion. The Defendant's fears were obviously confirmed when at trial his attorney, after the Government closed his case, his attorney failed to present a defense and rested without putting on any witnesses. The Defendant was frustrated and popped his attorney.

Under the Sixth Amendment to the Constitution of the United States, a person accused of a crime has the right to have assistance of counsel for his or her defense. The right to counsel means more however, than the right merely to have

some attorney physically present with the accused during a criminal proceeding. The right to counsel is regarded as implying a right to effective assistance by competent defense counsel and if counsel's performance at a given proceeding does not meet reasonable professional standards or if the judge, prosecutor, or others so interfere with the defense that counsel is unable to properly defend the accused's interests, then the accused may have grounds for relief of his conviction, sentence or other adverse decision resulting from the proceeding, Evitts v. Lucey, 469 U.S.387, 821, 105 S.Ct. 830 (1985).

The following factors are considered when reviewing a denial of a motion to substitute counsel by an indigent Defendant: (1) the timeliness of the defendant's motion; (2) the adequacy of the court's inquiry into the defendant's

complaint; and (3) whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense. U.S. v. Rogers, 769 F.2d 1418 1423 (9th Cir. 1985). U.S. v. Walker, 915 F.2d 480, 482 (9th Cir. 1990).

First, in nearly all cases which address the issue of substitution of counsel by an indigent Defendant made the motion literally on the eve of trial. U.S. v. McClendon, 782 F.2d 785, 789 (9th Cir. 1986). U.S. v. Williams, 594 F.2d 1258, 1260-61 (9th Cir. 1979).

Secondly, the Court must focus its inquiry into the nature and extent of the conflict between defendant and counsel and not just to the competency of counsel. U.S. v. Walker, 915 F.2d 480 (9th Cir. 1990). In the instant case, at the hearing on October 4, 1990, the court merely identified that the Defendant was

counsel more than eight weeks before trial, and was directed by the court to relate any further concerns he had to his attention. The Defendant attempted to inform the court again in a second letter of his concerns regarding his representation which was addressed by the Court seven (7) days prior to trial.

Secondly, the Court must focus its inquiry into the nature and extent of the conflict between defendant and counsel and not just to the competency of counsel. U.S. v. Walker, 915 F.2d 480 (9th Cir. 1990). In the instant case, at a hearing held on October 4, 1990, the court simply let the attorney know that the Defendant was concerned about his lack of personal contact with him throughout the previous thirteen (13) months and that the Defendant feared that he was not devoting enough time to his case to be adequately prepared for trial. The court's inquiry

did not attempt to determine; however, how the Defendant's concerns and his attorney's lack of contact might have already affected the attorney's ability to prepare the case. In other words, given the lack of contact, had any meaningful attorney/client relationship really been established? Furthermore, it became apparent to the court that the Defendant and his attorney were fighting about his attorney stipulating, without his approval, to the authenticity of certain tapes to be used at trial. The Court instructed the attorney to make more time to see his client in order to prepare for trial and to respect his client's thoughts about the stipulation.

Apparently, the Defendant in a panic, sent another letter to the court which reemphasized his concern about his representation. The court acknowledged its receipt and treated the letter as a

motion to substitute counsel. Instead of inquiring into the matter further in open court, the court permitted the Defendant's public defender to submit a response to be reviewed by the court under seal, over the Government's objection.

No further inquiry was made, no hearing was held and no discussion took place regarding this issue. The court simply denied the Defendant's motion based upon information that was not put in the record.

In Slappy v. Morris, 649 F.2d 718 (9th Cir. 1981) the Ninth Circuit Court of Appeals held because of the importance of the attorney/client relationship to the substance of the defendant's Sixth Amendment right to counsel, the Sixth Amendment encompasses the right to have the trial court accord weight to that relationship in determining whether to grant a continuance founded on the

temporary unavailability of the defendant's attorney. In Slappy the defendant's public defender prepared his case for trial but became ill with appendicitis and could not appear on his behalf. Without consulting the defendant, another public defender took his place one week before trial. On the day of trial the defendant complained to the court about the new attorney's lack of time to prepare and insisted the case be continued until his original attorney could return to try it. The court overruled his motion for a continuance and forced the defendant to proceed with the attorney who was not prepared. Throughout the trial the defendant complained that the case should be continued because the new attorney was not adequately prepared and that his right to counsel was being infringed. Eventually his new counsel asked to be removed because he felt he could not

render effective assistance in the face of such conflict. After a conference in chambers, however, he withdrew his motion. The defendant was eventually convicted. On appeal, the court held the refusal under the circumstances, to grant a continuance, constituted a violation of the defendant's Sixth Amendment right to counsel. On appeal the Ninth Circuit held the right to counsel includes more than just the right to representation by competent counsel at trial. It concluded that the right would be without substance if it did not also include a right to a meaningful attorney/client relationship. The special nature of the relationship was explained by the Alaska Supreme Court in McKinnon v. State, 526 P.2d 18, 22 (Alaska 1974) (footnotes omitted) in pertinent part as follows:

> The attorney/client relationship involves an intimate process of consultation and planning which culminates in a state of trust

> and confidence between the client and his attorneys. Often, the outcome of a criminal trial may hinge upon the extent to which the defendant is able to communicate to his attorney the most intimate and embarrassing details of his personal life. Complete candor in attorney/client consultations may disclose defenses or mitigating circumstances that defense counsel would not otherwise have uncovered. At the very least, an open exchange between attorney and client will often foreclose the possibility of surprise at trial.

"Representation at trial is without substance if the defendant does not have confidence in his attorney's ability to represent the defendant's best interest. It is unlikely that a criminal defendant will have a legal education. He therefore, will have to rely on the attorney's advice for the most basic decisions in a criminal trial -- whether to plead guilty, whether to testify, whether to present a defense, and which witnesses to call. If the defendant does not trust his attorney, he may be

unwilling to follow his attorney's advice in these most important areas." Slappy, 649 F.2d 718, 720, 721 (1981).

The court in the Defendant's case did not inquire into the extent of damage to the attorney/client relationship caused by the attorney's lack of communication with his client. The court seemed to assume that more communication between them would solve any concerns the defendant might have. The events that followed clearly indicate that irreconcilable differences had developed between the Defendant and his attorney which resulted in a total lack of communication between them. The Defendant, one week before trial and upon the court's specific direction, attempted once again to inform the court regarding his ongoing concerns about his representation and relationship with his attorney. Instead of investigating further, the court accepted a sealed

statement from defense counsel and without a hearing overruled the Defendant's motion to have new counsel appointed.

At trial, the inadequacy of the court's inquiry appeared immediately when, after thirteen (13) months of alleged trial preparation, the Defendant's attorney presented no defense on his behalf. Although some may argue such a tactic to be legitimate trial strategy, such an explanation is weak in the face of the attorney's insistence that he had at all times been doing his best to prepare the Defendant's case and is consistent with the Defendant's continuous claim that his attorney had not been working on his case.

When the Petitioner attacked his attorney in front of the jury, it should have been clear that the mistrust and animosity the Petitioner felt toward his attorney was too great to have allowed any

meaningful attorney/client relationship to have ever developed between them. Instead of attempting to discern whether the Defendant's actions were truly a manifestation of legitimate frustration or simply a desperate attempt to intentionally prevent a mistrial, the court continued on. The court made a snap judgment, without any further inquiry, that the Defendant's actions were merely an intentional ploy to derail the trial. In addition, he further prejudiced the Defendant by demanding that the trial continue, forcing the Defendant's attorney to give a closing argument in torn clothing, and by making the defendant sit in handcuffs with the bailiffs in clear view of the jury while his attorney sat alone at counsel table.

The Defendant felt more than mere frustration because obviously no attorney/client relationship ever existed.

He was facing a life sentence. He had extremely serious concerns about his representation which were swept under the rug as if they were of little consequence. And then, his attorney put on no proof on his behalf. He simply stood up and rested.

Clearly, the court's inquiry into the extent of conflict between the Defendant and his attorney had been deficient. The defense attorney's lack of pretrial communication with his client, his failure to present a defense on behalf of his client as well as the Defendant's behavior at trial clearly indicated that irreconcilable differences had developed between them resulting in a total lack of communication, and that no meaningful attorney/client relationship had ever been established.

This Court should grant Certiorari because the Court of Appeals for the Ninth

Circuit has so far sanctioned the lower court's departure from the accepted and usual course of judicial proceedings as it relates to the trial court's sealing and withholding of evidence critical to the determination of the Defendant's right to counsel guaranteed to him under the United States Constitution, as to call for an exercise of the Supreme Court's power of supervision.

CONCLUSION

For the foregoing reasons, Counsel for the Petitioner respectfully urges that this Petition be granted.

Respectfully submitted,

DENNISON & ASSOCIATES

DEANNA L. DENNISON
Attorney for Petitioner
524 Greenup Street
Covington, Kentucky 41011
(606) 491-3700

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of March, 1993 mailed a copy of the foregoing Petition for Writ of Certiorari by first class postage prepaid to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; Cathy A. Catterson, Clerk of the United States Court of Appeals for the Ninth Circuit, Two Rincon Center, 121 Spear Street, San Francisco, California 94105, and three copies to the Assistant United States Attorney, John S. Gordon and Assistant United States Attorney, Lisa B. Lench, 1400 United States Courthouse, 312 North Spring Street, Los Angeles, California 90012.

DEANNA L. DENNISON